

# SUSPENDED SENTENCE: ITS DESIRABILITY IN NIGERIA

By  
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## **Introduction:**

I will preface this paper with a quotation from T. Selin. According to him,

*The nature of punishments and the philosophy that informs them, reflect the structure and the level of development of a society; these change, so do the attitudes towards offenders as well as the resultant ways of dealing with them.*<sup>12</sup>

The major role of law in any given society is to sustain the social equilibrium of that society. The history of evolution of societies reveals that from time immemorial, every society sets standards of behaviour, the breach of which attracts some form of correction or punishment. Sanctions have been imposed to restrain deviant members from jeopardizing the individual or collective life, property and values of the society. In all cases, the welfare of the society is paramount and must transcend the wishes of the individual members of that society. This is the foundation of any criminal policy, which would naturally comprise law, sociology, psychology and anthropology. In this context, the expression of what conduct should be preserved or prohibited.

Criminal policy is a *sine qua non* in any society.”<sup>13</sup> It may be formulated scientifically as a deliberate policy or it may be developed on the basis of custom and will therefore be the result of trial and error. In whatever way it is formulated, criminal policy is the totality of the strategies or measures adopted in any society to deal with the prospective and actual criminal or delinquent conduct of members of that society. Such strategies/measures may include the removal of the factors that encourage criminal behaviour, the offer of incentives and disincentives, education, deterrents and at the extreme end, sanctions.<sup>14</sup> The aim of such policy is to guide the society or the state as the case may be, as to the contents of substantive criminal law; the procedural steps that have to be taken to bring offenders to justice; the punishment, rehabilitation and reintegration of offenders into the society and the rights of and compensation to victims of crime. The questions that arise for discussion here are: does Nigeria have any clear and operable criminal policy? If the answer is positive, how far

12. Selin, T., “Correction in Historical Perspective” (195 S) Vol. 23, Law and Contemporary Problem,

13. See M. Nasir, “Criminal Justice: Restitution, Compensation and Victims Remedies” in Adetiba S. (ed.) Compensation and Remedies for victims of Crime (Lagos: Federal Ministry of Justice, 1990 P.15

14. Karibi-Whyte, A.G. Criminal Policy: Traditional and Modern Trends (Lagos: Nigeria Law Publication Publications Ltd. 1988 pp. 16 – 17.

has the policy been operated to cover the entire field of criminal justice in line with global trends particularly in other Common Law jurisdictions?

Answers to the above questions are likely to take Nigeria's concepts of criminal justice, law and policy to the cleaners and would take much more than what this paper has to offer to supply the answers. This paper therefore focuses on an aspect of criminal law and policy – sentencing – which is a procedural step in imposing punishment or sanctions. It necessarily examines the scope and content of one of the non-institutional methods of imposing criminal sanctions on offenders with particular reference to the Nigerian Criminal Procedure Act (CPA).<sup>15</sup>

It examines the concept of suspended sentence or probation under Nigerian law with a view to determining whether or not it is applicable under her criminal justice system. The paper offers an opinion on how desirable and practicable suspended sentence is in this country given Nigeria's structure of administration of criminal justice and general level of development and concludes by saying that in as much as suspended sentence is desirable as an alternative to direct imprisonment, prevailing judicial attitudes, inadequate legislation, physical/institutional structures, personnel and other logistics currently on ground make its operation difficult. The paper however offers suggestions on the way forward.

### **The Concept of Suspended Sentence**

The word “probation” is often used interchangeably with “suspended sentence.” As a matter of fact, the former is more frequently used than the latter when dealing with matters relating to the subject under review. Any attempt to understand the scope, problems and prospects of the subject under discussion, will necessarily imply a good understanding of the common and legal meanings ascribed to the key terms in the subject.

Ordinarily, the word “probation” is a noun, which can mean any one of the following:

- (1) A time or period of training and testing in which a person's fitness, for work or membership in a social group is tested to determine the person's suitability for the job or position; or
- (2) A fixed trial period in which a student is given time to try to improve on or redeem his bad grades or conduct; or
- (3) The act of suspending the sentence of a person convicted of a criminal offence and granting that person provisional freedom on the promise of good behaviour; or a discharge for a person from commitment as an insane person on condition of continued sanity and of being recommitted upon the reappearance of insanity.<sup>16</sup>

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15. Cap. 80, Laws of the Federation of Nigeria, 1990.

16. See the web dictionary definition at <http://education.yahoo.com/reference/dictionary/entries/12/po57.1200.html> assessed 14/06/04.

The legal definition of probation is not too far from option (3) given above. The word has been defined severally but the obvious differences in the different definitions are only a matter of semantics. Black's Law Dictionary defines probation as "the sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under the supervision of a probation officer in lieu of incarceration."<sup>17</sup> While Holten and Lamer define it simply as "an alternative to incarceration in a jail or other institution."<sup>18</sup> The United States of American Department of Correctional Services has also defined it as:

*...the procedure under which a defendant, against whom a judgment of conviction of a public offence has been or may be entered, is released by the court subject to supervision by a resident of this state or by the judicial district department of correctional services.*<sup>19</sup>

The legal meaning ascribed to the phrase 'suspended sentence' is in *pari materia* with the definitions offered above. But for the avoidance of doubt, we shall take a look at some definitions. Suspended sentence is a noun, which means a punishment given to a criminal in a court of law to the effect that such criminal would go to prison if he commits another crime, within a particular period of time.<sup>20</sup> In other words, it is a sentence on which execution has been withheld by the court based on terms and conditions.<sup>21</sup> The United States Supreme Court defines it as a conviction of a crime followed by a formal sentence whereby the offender is not required at the time the sentence is imposed to serve the sentence.<sup>22</sup> It is safe to conclude therefore that suspended sentence means a sentencing option whereby the court pronounces judgment and imposes a sentence and then suspends execution of the sentence subject to the defendant's compliance with conditions set by the court as a requirement of the suspended sentence. Revocation of the suspended sentence results in the execution of sentence already pronounced.

From the foregoing, it has become obvious that in criminal justice system, there is a procedural step in sentencing<sup>23</sup> known as suspended sentence or probation

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17. Black's Law Dictionary 6th ed. (St. Paul, Minn; West Publishing Co. IWOi p. 1202

18. Holten, N.G., & Lamar, 1...1.. The Criminal Courts Structures. Personnel, and Processes (New York: McGraw-Hill inc.) p.3.3.

19. See Definition of legal terms on <http://vw/v.Legts.State.p.Us/1ACODE:12003/907/Lhtml> assessed 14 /06/04.

20. Oxford Advance Learner's Dictionary of Current English 6<sup>th</sup> ed.

21. See Definitions of Common Legal Terms at <http://www.bartoncountv.org/attottry/definitions.Htm>.

22. Richards v Crump 260 S.C. 133, 194 S.E. 2d 575 at 576. See also Black's Law Dictionary, id at 1446.

23. A sentence is judgment, imposing punishment upon a defendant after conviction by the court in a criminal prosecution.

and that the conceptual meaning of the combined definitions of both terms is the same – that is a way of dealing with offenders without imprisoning them; meaning that the court releases a defendant found guilty of a crime without imprisonment subject to conditions imposed by the court.<sup>24</sup>

### **History, Scope And Content Of Suspended Sentence (Probation)**

Probation is essentially a 20<sup>th</sup> Century development and has its foundation in the United States of America.<sup>25</sup> The first probation officer – one John Augustus – was said to be a volunteer, who in 1841 offered to assist offenders if the court would release them to his care. The success of his pioneering work, gained so much recognition that in 1878, the first probation statute was enacted with provision for appointment of a salaried probation officer.<sup>26</sup> Since then, the growth of the practice became phenomenal and has spread quickly across the globe. Nigeria also caught onto the trend when she included in her Criminal Procedure Act, provisions for probation in Sections 435 – 440.

In terms of scope and content, probation is essentially a process or a procedural step taken in the course of administering criminal justice. Probation is not a right but a privilege.<sup>27</sup> It is a status the judge may impose upon an offender who has been found guilty but which the offender is not bound to accept.<sup>28</sup> It provides an alternative form of punishment to incarceration in jail or other institution and is seen as an “lenient sentence... and not simply a dismissal of the case.”<sup>29</sup> The sentencing judge usually has the choice to either suspend a sentence of imprisonment (suspended sentence) or sentencing the offender directly to a term of probation. Either way, the end result is that the offender retains his freedom subject to the terms and conditions which revokes the suspended sentence of imprisonment. Unless the law prescribes a minimum punishment, the court has the power to suspend the passing of sentence (generally for a period of three years) and place the offender on probation. It is the passing of the sentence, not the sentence itself that is being suspended. This means that if the person is convicted of another offence or violates the conditions of his probation during the period which the passing of sentence has been suspended, then the person may be sentenced for the original offence.

When imposing suspended sentence, the judge has considerable freedom in fixing the term of probation such that the term of probation may even be longer

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24. See the World Net Dictionary at <http://www.hyperdictionai v. com/dictionary/Probation> assessed 14/06/04

25. John A. Wallace, “Probation Administration” in Glaser, D, (ED) Handbook of Criminology (Chicago: Rand McNally College Publishing Company, 1974) p.949.

26. Holten & Lamar, *ibid*.

27. Newman, D.J. Introduction to Criminal Justice, 2<sup>nd</sup> ed. (Philadelphia Lippincott. 1978) p. 281.

28. Some offenders actually prefer to serve jail terms rather than accept to be bound by conditions attached to probation.

29. *Ibid*

than the jail term the offence may have attracted originally.<sup>30</sup> Usually, the length of the probation is anything from 6 months to 5 years depending on the nature and seriousness of the crime involved. In determining the length of the probation, the court determines what period is most likely to provide maximum opportunity for the rehabilitation of the offender, to allow enough time to determine whether or not rehabilitation has been successful, and to protect the community from further crimes by the offender and others.

The judge also sets the conditions of probation under which convicted offenders must live. Probationers are subject to the conditions established by the court for the probation order, and any additional reasonable conditions, which the court, having regard to the circumstances of each case may impose to promote rehabilitation of the offenders or protection of the community. Conditions may include but are not limited to residence, abstention from drugs and alcohol, psychiatric therapy, counseling classes, non possession of firearms, community services etc, and other matters the court, having regard to the peculiar circumstances of each case, consider necessary for preventing a repetition of the same offence or of the commission of other offences.<sup>31</sup> A court may direct an offender to attend a special programme or to seek help for drug, alcohol or mental health problem as a condition of the probation order. Offenders can also be required to live at a probation hostel for part of the order, if the sentencing judge feels they need a greater degree of supervision. Currently, some states in United States of America have made the wearing of a Global Positioning System (GPS) apparatus a condition for probation so that it would be easy to keep track of the movement of probationers at any time.<sup>32</sup> Whatever conditions are attached to probation, they must be reasonable and must:

- (1) Have a bearing on the original crime. The decision of a court, which made it a condition of probation that a convicted female robber must not get pregnant unless married while on probation has been severely criticized.<sup>33</sup>
- (2) Not relate to conduct which in itself is not criminal; or
- (3) Not forbid conduct not reasonably related to future criminal conduct by probationer.

Upon an order of probation being made, probationers are released back to the community under the supervision of probation officers for the duration of their terms. In England, a probationer order is referred to as “Community

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30 Ibid

31 See note (16) ante

32. Ibid

33 See Kerper H.B. & Kerper, 1., *Legal Rights of the Convicted* (St. Paul, Minn West Publishing co. 1974) P. 250.

Rehabilitation Order (CRO).” The whole idea of probation is to reabsorb the offender into the community for rehabilitation – even while being punished for his crime – under the supervision of a probation officer. The offender sees his or her probation officer regularly, aimed at making the offender take positive steps to avoid the folly of re-offending as to warrant revocation of probation. The probation officer or service may also refer offenders to other agencies for specialists help with housing, employment, drug or alcohol problems or mental health needs. The probation officer has the prerogative to advise. Probation officers keep record of their work and make reports to the court when alleged violations occur. They coordinate their work with other social welfare agencies, which offer services of a corrective nature operating in the area to which they are assigned.

Generally, in the absence of any violations of the conditions of probation, offenders are discharged either at the expiration of the period of probation or anytime that the court or a probation officer determines that the purposes of probation have been fulfilled. In summary, we have dealt with the general philosophy and mechanics of suspended sentence or probation. The question now is: what is its place in Nigeria?

### **Is Suspended Sentence Applicable In Nigeria?**

The answer to the above question is yes and no. Theoretically, it does exist but only as far as the ink with which the provisions relating to probation was written in the Criminal Procedure Act. For the avoidance of doubt, section 435(1) of the CPA provides thus:

*Where any person is charged before a court with an offence punishable by that court, and the court is of the opinion that the charge is proved but having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, it is expedient to inflict any punishment or that it is expedient to release the offender on probation the court may without proceeding to conviction make any other either –*

- (a) dismissing the charge: or*
- (b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding three years as may be specified in the order.<sup>34</sup>*

Then Section 436 provides for probation orders and conditions of recognizance

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<sup>34</sup> The italics is mine to emphasize the fact that probation does not have age limitations. Section 435 (1) of the CP.A.

for probation reproduced in part thus:

- 436** (1) A recognizance ordered to be entered into under this Part shall if the court so orders contain a condition that the offender be under the supervision of such person or persons of either sex, hereinafter called a probation officer, as may, with the consent of such probation officer, be named in the order during the period specified in the order, and an order requiring the insertion of such condition as aforesaid in the recognizance is in this Part of this Act referred to as a probation order.
- (2) A recognizance under this Part of this Act may contain such additional conditions with respect to residence, abstention from intoxicating liquor and any other matters as the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or the commission of other offences.
- (3) The court by which a probation order is made shall furnish to the offender a notice in writing stating in simple terms the conditions he is required to observe.

The above provisions are in line with the philosophy and practice of suspended sentence in other jurisdictions. In practice however, suspended sentence is largely a mirage in Nigeria. Apart from cases dealing with juvenile offenders, the courts generally view probation with respect to adult offenders with suspicion. Of all the non-institutional disposition methods, the courts seem to favour the imposition of fines with a passion. In the majority of cases, the closest to probation the courts go when dealing with minor offences (particularly with first offenders) is binding-over and conditional discharges<sup>35</sup> This is a sad commentary for our criminal justice system considering that judges and magistrates in Nigeria have a wide discretion in the area of sentencing. A member of that elite group once confessed that “a good many of our magistrates do not as a rule exercise that discretion in the best interest of the accused himself and the public.”<sup>36</sup> In exercising their wide discretionary powers, Nigerian Judges tend to adopt a patently punitive and retributive approach despite existing legal provisions that encourage the use of probation and other noncustodial measures. Even the policy makers in Nigeria have acknowledged this fact when a government representative stated thus:

*Nigeria has the statutory provisions for probationary sentences, but the administrators of justice hardly ever employ such provisions. Yet evidence shows that on the basis of the statutorily stipulated criteria for probationary sentences, about 40% offenders presently sent to prison should have qualified for such sentences. This situation ... may be explained by the colonial heritage and training of our justice administrators, their belief in*

35. M. Adekunle Owoade, “Reform of Sentencing in Nigeria – A note on Compensation, Restitution and Probation” in Adetiba, S. (ed) Compensation and Remedies for Victims of Crime (Lagos Federal Ministry of Justice, 1990) pp. 123 – 124.

36. L.O. Fadipo, “Fadipo, “Sentencing Processes, Practices and Attitudes as seen by a magistrate and a Customary Court Judge” in Elias, R., (ed). The Nigerian Magistrate and the Offender (Benin City: Ethiope Publisher” 1972) p. 41.

*deference, and their tendency to take the path of least resistance i.e. imprisonment and/or fine.*<sup>37</sup>

The general attitude of the courts in this respect might not be unconnected with the fact that Nigeria operates the retributive system of criminal justice and the fact that Nigeria lacks adequate infrastructure and personnel to handle the project of probation, which falls squarely in the rehabilitative aspects of criminal sanctions. Their job has not been made easy by the fact that the legislative objective in criminal legislation is expressly punitive so as to achieve deterrence of criminal tendencies. The courts, following the philosophy of retribution have emphasized deterrence rather than the philosophy of rehabilitation or reformation in our criminal policies. But from all indications, fines and imprisonment have not yielded many fruits. Rather, Nigeria has had to battle with unending congestion in the prisons for decades now. In the circumstances, is the alternative presented by suspended sentence worth trying?

### **How Desirable Is Suspended Sentence In Nigeria?**

It is a notorious fact that imprisonment of offenders in Nigeria does not, to a large extent, serve as a deterrent to convicted or prospective criminals. Although the prison is supposed to be a correctional institution for rehabilitation, preparatory to re-absorption into the society, experience has shown that jailed first offenders more often than not come out hardened from their interactions with professional jailbirds and condemned criminals. The punitive and hard-line approach adopted by judges and magistrates in sentencing offenders is also evident in the operations of the prisons to which the offenders are sent. Although the 1971 government white paper on prison re-organisation specifically states the function of the Nigerian Prisons Service as identifying the reasons for the antisocial behaviour of offenders and training them to become useful citizens, in practice, the offenders are treated as undesirable and irredeemable members of the society. According to Ahire,<sup>38</sup> “the whole notion of reformation and correction within the prisons can be viewed as a ‘grand hypocrisy in which custodial concerns, administrative exigencies and punishment are all disguised as treatment.’”

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37. Nigeria National Paper to the sixth United Nations Congress titled: Crime and the quality of life in Nigeria” pp. 1-9 cited Philip T. Ahire.” Penological Policies of the Nigerian Criminal Justice System: in Adetoba S. (Ed) Compensation and Remedies for Victims of Crime, (Lagos, Federal Ministry Justice, 1990) p. 327.

38. Philip T. Ahire, Penological Policies of the Nigerian Criminal Justice System in Adetiba S., (ed) Compensation and Remedies for Victims of Crime (Lagos: Federal Ministry of Justice, 1990) P. 337.



Nigerian prisons are “human cages” with no facilities for correction, reformation and vocational training.<sup>39</sup> Alemike<sup>40</sup> is of the view that the so called policy of reformation allegedly-being operated in the prisons is “no more than a public disguise for ‘modernizing’ while in practice, nothing has changed from the inherited penal system that was geared towards punishment, incapacitation and deprivation of incarcerated offenders.” The end result for offenders and the society is a vicious circle of character imbalancing and unending social problems respectively.

In the light of the above, suspended sentence or probation is a desirable alternative in Nigeria because it is anchored mainly on reformation and rehabilitation of the offender and the philosophy of which contends that penal measures should have a therapeutic value. In other words, penal measures should be calculated to impact moral improvement in a person’s character so that he will be less inclined to re-offend in the future. In countries of Europe and America where probation is widely used, the rehabilitation of probationers involve the adoption of a wide range of programmes like psychiatric therapy, counseling, hospitalization, job opportunities, compulsory learning etc. There is evidence that the probation service has a positive effect on preventing re-offending. The following selection of statistics shows the different ways in which probation has been shown to work in England.

- \* A study of drug users being supervised by the probation service in Inner London showed large falls in the number of crimes they committed each month. Excluding offences of drug possession, the average dropped from 30 crimes to 5.
- \* The vast majority of offenders (90) said their probation officer had offered them help to tackle their drug use. Over half felt that the officer had helped “a great deal”
- \* In one scheme working with offenders in six London boroughs, over 80% of offenders referred by the probation service for employment and training advice were successfully placed in jobs or training not only that, offenders react positively to community sentences: a 1996 survey of offenders on community service orders in a Middlesex probation area showed that:
  - \* 69% think that being a community service will stop them offending.
  - \* 55% have learnt new skills while on community service.
  - \* 37% think they have improved their job chances.
  - \* 75% rate the work they do as worthwhile to the community.

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39. Y. Kayode, “Beyond the human cage.” Alternatives to a Decaying Institution” being a paper presented to a seminar on Crime and Social Control in Nigeria at Ife from July, 27- 30, 1987.

40. E. Alemike, “The Smoke Screen, Rhetotrics and Reality of Penal Incarceration in Nigeria” (19S3) Vol. 7 (1) International Journal of Comparative and Applied Criminal Justice, pp. 137-149

As for the people they were working for, 94% declared themselves 'satisfied or very satisfied' with the standard of work carried out and 97% said they would recommend community service to others.<sup>41</sup>

Sometime in the late 80s, the Nigerian Law Reform Commission held a debate on the desirability of suspended sentences in the criminal justice system and this generated a lot of frenzy and excitement among stakeholders who thought that the subject under debate was novel and held great potentials for prison decongestion. What they failed to realize is that the practical effects of section 435 and 436 of the CPA are to operate effectively as suspended sentence. If only our courts will put them into full use. But then, is Nigeria well equipped to translate the theory of suspended sentence enshrined in her Criminal Procedure Act into practical reality?

### **How Practicable Is Suspended Sentence In Nigeria?**

Suspended sentence in Nigeria is practicable. The statutory backing for such a facility has been in her statute books for decades and would only take some commitment from the government to give it effect and courage on the part of the administrators of criminal justice to shelve some of their pessimism and prejudices in exercising their discretion when sentencing convicted offenders. In the course of administering criminal justice, judges and magistrates regularly release crime suspects on bail to sureties or even on self-recognizance without sureties while they are standing trial before them or some other court. One wonders why such a practice (in the form of probation) cannot be extended to offenders convicted of minor crimes or even major crimes where it appears that the interests of both the criminal and the society would be better served in a non-institutional environment.

However, we are persuaded that, given the current state of non-institutional correctional facilities and trained personnel on ground in Nigeria, giving effect to the statutory provisions relating to probation may prove very difficult considering the fact that the project is capital intensive and require a certain level of commitment based on integrity from the government, law and policy makers, law enforcers, offenders and the society in general. The average offender, given half a chance, would want, to escape punishment. But we do believe that this attitude can be changed by re-orientation of the public aspects of our penal laws.

### **Conclusion And The Way Forward**

This paper has attempted a conceptual analysis of suspended sentence or probation as applicable in Nigeria from a comparative point of view and has

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41. See generally <http://www.london-probation.Org.Uk/Index.Cfm?Article1D=373>.

drawn attention to the fact that practical effect has not been given to the philosophy and theory of the concept mainly because the administrators of justice in this country, for various reasons, have failed to take the bull by the horns. The paper has identified that suspended sentence is statutorily and in policy applicable in Nigeria but nonexistent in practical terms. As desirable and practical as suspended sentence is, Nigeria is developmentally not ready for it. The way forward lies in the complete overhaul of her criminal law and policy to reflect a shift from inherited colonial values to a modern result oriented criminal justice system. In the interim, in order to have a functional system of suspended sentence, we humbly recommend the following:

- (a) There is a pressing need for a coherent policy direction within the Nigerian criminal justice system. This could be achieved by evolving a philosophy that identifies and articulates the vision of the overall system and specifies the role each of the arms should play in this regard.
- (b) Nigeria should urgently commission a study of the dynamics and mechanics of probation as practiced in the more advanced countries of the world. A scientific study of the way the system operates in these countries will help guide the government on the kind of result-oriented facilities and programmes to design to suit our environment.
- (c) Government must seek the assistance of non-governmental partners. London Probation for example, works with a range of statutory and voluntary sector partners for policy development and service delivery. It is represented in multi-agency criminal justice partnerships such as Crime Prevention Teams and Youth Offending Teams. Probation officers are seconded to these bodies to represent the probation service and advice on policy.
- (d) The legislative thrust of criminal justice should shift focus on custodial punishment and more on the rebuilding of the broken-down character, values and morals of offenders.
- (e) Government must commit all the resources needed to run a viable probation system which would necessarily involve social welfare institutions like welfare services, community development centres, correctional services departments etc. manned and run by well-trained officers.
- (f) Judicial attitudes must change and just in case (with due respect) the great number of the administrators of justice do not understand the impact of section 435 of the CPA, there should be an amendment in clear terms that provision is also applicable to adults.

This paper does not in any way pretend to have done justice to the subject under discussion, constructive criticism are therefore welcome even as we seek the indulgence of those who might feel offended by the contents of this write – up.